

WATER PROTECTION: WHAT CAN MUNICIPALITIES REGULATE?

**DRINKING WATER SOURCE PROTECTION WORKSHOP FOR PLANNERS
May 15, 2003**

Maura Carroll, General Counsel

General Municipal Authority

Municipalities derive all of their authority to regulate or to act in any way, from powers specifically delegated to them by the legislature. Since New Hampshire is not a “home rule” state, permission to do something must be granted in statute in order for municipal officials to exercise any authority on a particular subject. New officials often ask “where does it say we *can’t* act on or regulate this item?” The proper initial question in this state is “where does it say we *can* act or regulate in that particular area?”

This paper will focus on the subject areas in which the legislature has granted regulatory authority to local government relative to water issues, including groundwater protection, zoning powers, site plan review, master planning, shoreland protection and rivers management. This presentation is designed to provide a brief overview of a municipality’s regulatory authority related to water, not an exhaustive volume on the subject. If you have questions related to the law and a specific situation in your community, you should contact your city or town attorney, or member municipalities may always direct legal questions to NHMA’s Legal Department.

Groundwater Protection

Much of the recent activity as well as the controversy surrounding water issues, relate to groundwater protection. As the proposed uses of groundwater increase, particularly commercial uses, local officials and residents of communities targeted for large groundwater withdrawals are clamoring for protection and are asking detailed questions about the need for local involvement in the process. There are increasing concerns about the renewability of water resources and the fear that commercial operations like water bottling or even recreational operations such as ski areas, threaten the long-term viability of these water resources for drinking purposes.

You should first be aware that municipalities may not regulate large withdrawals of water, per se. That is a state function performed by the Department of Environmental Services in accordance with the statute and administrative rules. Municipal officials and

concerned residents can become directly involved in the state regulatory process by participating in hearings and by providing specific recommendations to DES regarding withdrawals. Also, municipalities can regulate where wells may be sited through the site plan review process and attach conditions to the siting as long as they do not affect the amount of the withdrawal approved by DES.

The Groundwater Protection Act is found at RSA Chapter 485-C. Its stated purpose is “to protect the natural quality of the groundwater resource...by assisting local groundwater protection efforts and by establishing procedures and standards for the classification and remediation of groundwater.” The legislature acknowledges the importance of groundwater and “the role of local planning and management in groundwater protection and intends” through the statute, “to provide a framework for local groundwater protection.” The purpose section of the statute further provides that since “groundwater is primarily a local resource, cities and towns should have the first opportunity to institute programs for groundwater protection within the scope” of the statute. RSA 485-C:1

In keeping with the purpose of the statute, part of the duties of the Department in protecting groundwater is to help local and regional entities to develop and administer local wellhead protection programs, and to investigate, manage, and remediate contaminated groundwater. RSA 485-C:3. DES also classifies all groundwater in order to determine appropriate protections and management practices, RSA 485-C:5, and if reclassification is requested, DES must hold a public hearing and provide notice to landholders and municipalities affected by the proposed reclassification prior to holding the public hearing. RSA 485-C:9.

The State must notify a municipality when a permit application is submitted for an activity that is a potential contamination source in the most protected groundwater classification areas. DES must suspend action on the application for 30 days so that the municipality can submit recommendations. If DES deviates from these recommendations, it must provide written findings explaining such deviations. RSA 485-C:14.

Town and city health officers and any authorized representative of DES may go onto property for the purpose of administering the groundwater protection statute, RSA 485-C:15, and may also issue written cease and desist orders against violators. The specifics of the cease and desist process are found at RSA 485-C:16.

No person may currently withdraw 57,600 gallons of water in a 24-hour period without prior DES approval, RSA 485-C:21, and without written notice to the governing body of the municipality in which the well is to be or is already located. The governing bodies of each municipality and each water supplier within the anticipated zone of contribution to the well must also be notified. RSA 485-C:14-a. The zone of contribution is defined as “the subsurface volume from which groundwater flow is drawn to the pumping well.” RSA 485-C:2, XIX.

Notice from DES includes forwarding copies of the application to each governing body and water supplier within the anticipated zone of contribution to the well. DES must hold a public hearing in the municipality where the well is to be located if the governing body has requested one within 15 days of receiving the application. The applicant, governing body, and water supplier within the anticipated zone of contribution may submit comments within 45 days of the hearing or after receiving the application if there is no hearing. If the comments include recommendations, DES must specifically consider them and issue written findings with respect to each issue raised. RSA 485-C:21.

Planning and Zoning Authority

There is local planning and zoning authority that municipalities may exercise to protect water resources. Municipal planning boards are charged with the task of preparing and amending a master plan that will guide the city or town in its development. RSA 674:1. The statute describes the purpose of a master plan and what should be contained within it. It allows the plan to include a natural resources section, specifically referencing the development of local water resources management and protection plans as outlined below, and a regional concern section, describing areas in one municipality that may include resources shared with or bordering on another municipality. RSA 674:2, III (d) and (i).

Municipalities are granted general authority to adopt and amend zoning ordinances through their local legislative bodies, i.e. town meetings, town or city councils, and boards of aldermen. RSA 674:16. The statute specifically allows those zoning ordinances to be written to facilitate the adequate provision of water locally as well as to “assure the proper use of natural resources.” RSA 674:17, I (g) and (h). The statute also provides municipalities with the authority to adopt innovative land use controls that include “environmental characteristics zoning,” RSA 674:21, I (j), in order to protect water resources.

Within their authority to regulate subdivisions, planning boards are given the power to adopt regulations against scattered and premature development when there is an inadequate water supply, and the authority to condition approval of a project on the extent to which and the manner in which water facilities or other facilities are installed. RSA 674:36.

Municipalities that have exercised their zoning authority and whose planning boards have adopted subdivision regulations are also given authority to review site plans. RSA 674:43. The boards may include in their site plan review regulations provisions to guard against inadequate protection of groundwater quality. RSA 674:44.

Local Water Resources Management and Protection Plans

The Office of State Planning has within it a water protection assistance program, which was established for the express purpose of encouraging municipalities to evaluate water resources and to develop programs for the protection of surface water and groundwater.

RSA 4-C:19. OSP is charged with preparing guide materials for municipalities primarily through the regional planning commissions. RSA 4-C:20.

RSA 4-C:22 provides the process whereby a municipality can include a local water plan in its master plan, as well as the process for implementation of the plan through local ordinance adoption and enforcement. If there is an immediate need for protection of critical water resources, a municipality may adopt a temporary measure or interim zoning regulation as provided in RSA 674:23, III.

Where water protection needs to extend beyond municipal boundaries, RSA 4-C:23 authorizes cities and towns to adopt inter-municipal agreements pursuant to RSA 53-A. These agreements would allow development and implementation of regional water plans and ordinances to enhance the effectiveness of individual local water plans.

Conservation Commissions

Communities may establish conservation commissions in order to assure proper use and protection of natural resources and watershed resources. Conservation commissions are charged with conducting research of local land and water areas, and with keeping an index of marshlands, swamps and wetlands. Its members may recommend to the local governing body or to the state Department of Resources and Economic Development suggestions for protection, development, or better use of the areas. RSA 36-A:2. Commissions may acquire water rights or other contractual rights that protect the future use of open space, land areas, and water areas within the municipality.

Wetlands Protection

RSA Chapter 482-A governs the regulation of wetlands in New Hampshire. State and local law enforcement have had, for over a dozen years, concurrent jurisdiction to regulate wetlands by prosecuting any violation of the wetlands chapter. RSA 482-A:14. Municipalities may also apply for injunctive relief against existing or impending violations of the wetlands statute or any rules or orders issued pursuant to the statute. RSA 482-A:14-b.

In accordance with RSA 482-A:15, a municipality, either by its conservation commission, its planning board, or its governing body, may designate, map, and document prime wetlands lying within its boundaries. These maps and designations may be filed with DES, where they are subject to public review. Prime wetlands are defined in this section of the statute.

Drinking Water Protection

As a part of the Safe Drinking Water Act, RSA 485:18 allows health officers or water commissioners to remove polluting substances in the water supply and charge the expense of removal to the responsible party or parties. Municipalities may also apply for injunctive relief against existing or impending pollution violations according to RSA

485:20. Health officers may require any well or water supply to be analyzed for contaminants at no cost to an owner when there is suspicion of contamination and may, with DES approval, prohibit use of a well or cause a well to be closed. RSA 485:33.

OTHER WATER PROTECTION PROVISIONS

Rivers Management

RSA 483, the rivers management and protection statute, recognizes the value of the state's rivers and establishes a process whereby rivers or segments thereof can be nominated and accepted for protection pursuant to the provisions of the statute. Local river management advisory committees are appointed from residents recommended by local governing bodies in the municipalities through which the protected rivers run. Planning boards are given the authority to adopt local river corridor management plans as an adjunct to local master plans. See RSA 483:8-a and RSA 483:10.

Shoreland Protection

RSA 483-B was enacted to ensure the protection of public waters and to advance coordinated and planned efforts at development to assist in the use, preservation, restoration, and protection of shorelands in the state. Municipalities are given specific authority to enact land use ordinances that are more stringent than the minimum standards set out in the statute. RSA 483-B:8. Municipalities may seek injunctive relief, civil penalties, or issue cease and desist orders to enforce the provisions of the act. The statute also encourages municipalities that border on the same body of water to use a single code enforcement officer to monitor compliance with local and state requirements, presumably to assure consistent compliance with the statute.

Conclusion

At the present time, there are substantive areas where municipalities may affect or directly regulate issues related to water. As a result of the concerns raised by members of the public and elected officials at both the state and local levels, there has been much legislative activity to focus on water issues and to develop policies and programs to alleviate concerns.

During the 2003 legislative session, several bills were introduced to address water resources. Some sought to change existing statutes in a substantive way, by increasing protections in the law or by adding specific tasks to be performed by DES or local boards. Other bills created study committees or commissions or directed state agencies to perform particular studies that would promulgate scientific data for use in establishing public policy affecting water. The only bills surviving are study bills. From a municipal perspective, that simply delays the ability to make necessary substantive changes to

current statute. NHMA's membership adopted the following groundwater policy in September 2002 to advocate changes before the legislature in the '03-'04 biennium:

NHMA SUPPORTS legislation to require the State to evaluate the local and regional environmental and economic impact of proposed large water withdrawals, including increases in existing water withdrawals. The permitting process should require at a minimum: compliance with local and regional plans and ordinances; impact studies on existing and future land uses; recharge capability; and cumulative impacts of existing and proposed withdrawals.

Explanation: Water, both ground and surface sources, is an essential resource for the ongoing well-being of the State and its constituent communities. Every proposal to withdraw large quantities of water from any source or to remove it from the watershed should be evaluated for its long-term impacts on the environment as well as on the existing and future development of the region. State law encourages towns and regions to develop master plans including "a local water resources management and protection plan" (RSA 674:2, VIII). Present law and agency rules, including PUC and DES, do not require such evaluation and may result in withdrawal permits for projects that ignore municipal and regional water resource plans, municipal zoning ordinances, thorough hydrological evaluations, and reasonable projections of future water needs. No waiver should be granted by the PUC under RSA 674:30 (utility structures) for a water utility unless a permit has been granted by DES in accordance with the statute and rules for evaluation of the local and regional impact of the proposal.

The protection of water resources is an issue that has captured the attention of elected official and citizen alike. It will continue to be the focus of attention at the legislature as well as at the local level, and will need the ongoing involvement of those with interest and expertise. The preceding policy will govern NHMA's legislative efforts and guide the development of specific statutory language to assist municipalities in carrying out their duties. On behalf of New Hampshire's cities and towns, NHMA looks forward to the continued public policy debate surrounding the protection of water resources.

The author wishes to acknowledge the work of Mark Beliveau, Esquire, of Pierce Atwood, who prepared a written document entitled "The Role of Local Government in the Conservation and Management of Groundwater" for the BIA Water Symposium in December, 2002. Given their parameters, several subject matters would necessarily be covered in both presentations, but Attorney Beliveau graciously allowed review and use of his work for the purposes of this presentation.